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80-1842

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DANIEL BIFIELD,

Petitioner

-vs-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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April , 1981

QUESTION PRESENTED

Should certiorari be granted to resolve a dispute among the circuit courts concerning whether a competency examination is mandatory under 18 U.S.C. §4244 when the district court receives evidence that a criminal defendant has sustained recent, serious and untreated head injuries?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	
OPINION BELOW.....	2
JURISDICTION.....	2
STATUTES INVOLVED.....	2
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING THE WRIT...	8
Certiorari Should Be Granted To Resolve A Dispute Among The Circuit Courts Concerning Whether A Competency Examination Is Mandatory Under 18 U.S.C. §4244 When The District Court Receives Evidence That A Criminal Defendant Has Sustained Recent, Serious And Untreated Head Injuries.....	8
CONCLUSION.....	14
APPENDIX A (Court of Appeals Decision).....	1a
APPENDIX B (Judgment of District Court).....	1b

TABLE OF AUTHORITIES

Cases:	Page
Drope v. Missouri, 420 U.S. 162, 181 (1975).....	13
Kenner v. United States, 286 F.2d 208, 211 (8th Cir. 1960).....	11
Krupnick v. United States, 264 F.2d 213, 216 (8th Cir. 1959).....	11
Lokos v. Capps, 625 F.2d 1258, 1260 (5th Cir. 1980).....	9
Meador v. United States, 332 F.2d 935 (9th Cir. 1964)..	8
Newfield v. United States, 565 F.2d 203 (2d Cir. 1977)...	9
Rose v. United States, 513 F.2d 1251, 1255 (8th Cir. 1975).....	11
Sanders v. United States, 373 U.S. 1, 20 (1963).....	11
United States v. Hall, 523 F.2d 665 (2d. Cir. 1975)..	9
United States v. Ives, 574 F.2d 1002, 1005 (9th Cir. 1978).....	9

United States v. McEachern,
465 F.2d 833 (5th Cir.),
cert. denied 409 U.S.
1043 (1972)..... 11

United States v. Nichelson,
550 F.2d 502, 504
(8th Cir. 1977)..... 11

United States v. Vowteras,
500 F.2d 1210 (2d Cir.),
cert. denied 419 U.S.
1069 (1974)..... 9

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, Daniel Bifield, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 6, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported, but appears in the Appendix hereto. The judgment of the United States District Court for the District of Connecticut appears in the Appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on April 6, 1981, and this petition for a writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. Appendix §1202:

(a) Any person who --

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony,

* * *

and who receives, possesses, or transports in commerce or affecting commerce, after

the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. §4244:

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the

examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

STATEMENT OF THE CASE

Following a joint trial with Susan Corin Bouton before a jury in the United States District Court for the District of Connecticut (Jose A. Cabranes, J.), Daniel Bifield was convicted of possessing a firearm in or affecting commerce after having been convicted of a felony, in violation of 18 U.S.C. Appendix §1202(a)(1). His conviction was affirmed by a panel of the United States Court of Appeals for the Second Circuit on April 6, 1981, and he is currently serving a two-year prison sentence.

On the morning his trial was scheduled to begin, Mr. Bifield orally moved, pro se, for a postponement of his trial to enable him to retain new counsel. During his comments to the court, he noted that "I've been confused, and I have a lot of pressure in my brain, a lot of things in my brain, a lot of things have happened to me." A recess was called, and after a discussion with Mr. Bifield defense counsel informed the court that Mr. Bifield had recently sustained a head injury and as a consequence appeared to counsel to be con-

fused and unable to understand the proceedings. Although not expressly invoking the provisions of 18 U.S.C. §4244, defense counsel requested a 24-hour postponement of the trial for purposes of a medical evaluation, rest and consultation with other counsel.

Defense counsel informed the court that a few days earlier a state court judge, having observed Mr. Bifield in court, had "ordered from the bench that because of visible injuries he be given medical attention. He wasn't given that attention. He was seen by someone in a jail infirmary, was incarcerated for a couple of days, and presently is seeking medical attention...."

Mr. Bifield, addressing the court, said: "I'm going through a lot of changes in my head. Okay? I got up, I get dizzy. This morning I had a hard time getting here. It's my fault, I've been sleeping, I've been resting three days. A Court or a Judge ordered me to go to get medical exam, and I was thrown in a room with two other inmates. I was just thrown on a metal bed. Okay? I was really hurting, and I was thrown in. I had to go through all this aggravation for three whole days. And

finally, everybody said, 'Oh, it doesn't look that bad,' and I'm hurt. And boom, then I was released from jail. Oh, yeah."

When the district judge asked Mr. Bifield when he had been released from jail, Mr. Bifield exhibited obvious confusion about what day of the week it was: "I spent Friday? Or what's today? Today is Monday, right? Friday. Thursday?"

The court denied the motion and directed that the trial proceed forthwith. The trial did thereupon go forward to conviction. Mr. Bifield did not testify on his own behalf.

Affirming, the Court of Appeals relied upon the Second Circuit rule that the medical examination provisions of 18 U.S.C. §4244 are discretionary and not mandatory, and that the actions of the district court in this instance, although perhaps incautious, did not rise to the level of an abuse of discretion: "We note in passing that evidence of serious untreated injuries to the head, in general should alert the district court to the probable need for an examination under §4244. Nevertheless, the district court must consider all pertinent

evidence before it in exercising its discretion to determine whether to order an examination under §4244. The district court did that here and we find no abuse of discretion."

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted To Resolve A Dispute Among The Circuit Courts Concerning Whether A Competency Examination Is Mandatory Under 18 U.S.C. §4244 When The District Court Receives Evidence That A Criminal Defendant Has Sustained Recent, Serious And Untreated Head Injuries.

Had Mr. Bifield been tried in the Ninth Circuit, a competency examination would have been ordered in this case when the court was informed by defense counsel that the defendant had sustained a recent, serious and untreated head injury which already had prompted a state court judge to order medical treatment. When the issue of competency is raised in the Ninth Circuit, examinations under 18 U.S.C. §4244 are mandatory. Meador v. United States, 332 F.2d 935 (9th Cir. 1964). "It is not within the discretion of the trial

court to deny the examination on the ground that there is no reasonable cause to believe the defendant incompetent." United States v. Ives, 574 F.2d 1002, 1005 (9th Cir. 1978).

The fact that a formal motion under 18 U.S.C. §4244 was not made is irrelevant, because the issue of the defendant's competence to stand trial was clearly presented to the district court. Cf. Lokos v. Capps, 625 F.2d 1258, 1260 (5th Cir. 1980).

Because Mr. Bifield happened to be tried in the Second Circuit, however, the district judge enjoyed wide discretion in deciding whether to order him examined. The Second Circuit holds that the provisions of 18 U.S.C. §4244 are discretionary and not mandatory. Newfield v. United States, 565 F.2d 203 (2d Cir. 1977); United States v. Hall, 523 F.2d 665 (2d Cir. 1975); United States v. Vowteras, 500 F.2d 1210 (2d Cir.), cert. denied 419 U.S. 1069 (1974).

This case presents a clear example of the disparity between the Second Circuit and Ninth Circuit rules, because it is apparent that under any standard more stringent than the Second Circuit's "dis-

cretionary" one the action of the district judge in denying an examination would have been overruled. Even the panel which affirmed his ruling expressed some concern that "evidence of serious untreated injuries to the head" did not prompt the court to order an examination. It affirmed only because it found "no abuse of discretion."

The Second Circuit's interpretation of the statute is plainly incorrect. By its terms, Section 4244 does not give the district court discretion. Whenever the question of competency comes before it, "the court shall cause the accused...to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court." (Emphasis supplied.)

The Second Circuit appears to stand alone in affording such wide discretion to district judges on the question of whether to order competency examinations. Although the entry of such orders is not always automatic in other circuits, it is generally held that a motion for competency evaluation must always be granted "unless the motion is frivolous or has not been

made in good faith." United States v. Nichelson, 550 F.2d 502, 504 (8th Cir. 1977), cert. denied 434 U.S. 922, citing Rose v. United States, 513 F.2d 1251, 1255 (8th Cir. 1975); Kenner v. United States, 286 F.2d 208, 211 (8th Cir. 1960); Krupnick v. United States, 264 F.2d 213, 216 (8th Cir. 1959). See also, e.g., United States v. McEachern, 465 F.2d 833 (5th Cir.), cert. denied 409 U.S. 1043 (1972).

In determining whether a motion is frivolous or made in bad faith, trial courts are cautioned in circuits other than the Second to "take great care to eschew the ultimate issue of competency." That issue must not be determined until after the examination has been conducted. United States v. Nichelson, supra, 550 F.2d at 504. As this court has previously observed, a defendant's incompetency "would not necessarily have been apparent to the trial judge." Sanders v. United States, 373 U.S. 1, 20 (1963).

In the present case, there is no suggestion that the competency issue was raised frivolously or in bad faith, and the Court

of Appeals appears to have found to the contrary. Defense counsel stated his claim of incompetency in some detail and gave a specific factual basis for the problem he perceived. He explained that he had a long professional acquaintance with Mr. Bifield upon which he based his observation that the head injury had produced serious mental changes. He made his representations as an officer of the court and noted that only days earlier a state court judge had found the head injuries sufficiently serious to order a medical examination. Mr. Bifield's statements to the court clearly confirmed the probability of incompetency.

Undoubtedly the district judge in this case was irritated that the claim of incompetency was raised at what was to be the opening day of trial. Precisely because such understandable irritation may interfere as it did here with carrying out the statutory intent, it is important to the administration of justice in the federal courts that district judges not be allowed wide discretion in ruling upon motions for competency examinations. As

this court noted in Drope v. Missouri, 420 U.S. 162, 181 (1975): "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change...." The Second Circuit rule discourages the trial courts from carrying out this court's mandate in Drope. The Ninth Circuit rule assures that the mandate will be followed, and it should now be adopted formally by this court.

The disagreement among the circuits regarding the mandatory vs. discretionary nature of §4244 examinations is ready for and in need of resolution by the Supreme Court. The issue is of obvious importance to defendants residing within the Second Circuit, but it is also most important to the administration of fair and equal justice in the courts of the United States, because as this court has instructed, the prohibition on trying incompetent persons "is fundamental to an adversary system of justice." Drope v. Missouri, supra.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted:

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DATED: April , 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of April one thousand nine hundred and eighty-one.

WILLIAM H. TIMBERS,
JON O. NEWMAN,
Circuit Judges,
ABRAHAM D. SOFAER,
District Judge,
Sitting by Designation.

UNITED STATES OF AMERICA,
Appellee,

v. 80,1458, 1460

SUSAN CORIN BOUTON and
DANIEL BIFIELD,
Appellants.

Appeal from the United States District Court for the District of CONNECTICUT.

This cause came on to be heard on the transcript of record from the United

States District Court for the District of CONNECTICUT, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the JUDGMENTS of said District Court be and they hereby are affirmed substantially for the reasons set forth in Judge Cabranes' opinion dated September 9, 1980, to the extent here relevant, supplemented by the following statement of our own.

Appellants, who previously had been convicted of felonies in the Connecticut state courts, were found guilty, following a jury trial, of violating 18 U.S.C. Appendix §1202(a)(1)(1976), which makes illegal the receipt, possession, or transportation in commerce of firearms by convicted felons. From the judgments entered on the jury verdict, appellants have taken this appeal.

Appellant Bifield claims that he was not mentally competent to stand trial and that the district court, having reasonable cause to order a medical examination under 18 U.S.C. §4244 (1976) sua sponte, committed reversible error in failing to do so. Appellant complained of confusion and dizziness at the opening of trial. His

counsel informed the court that he had suffered blows to the head (which apparently remained untreated) one week previously. The district court had colloquy with appellant, who also sought to dismiss his counsel. The transcript shows that appellant was responsive to the court and that he understood the remarks made by his counsel. Moreover, the record shows that appellant engaged in no inappropriate behavior during trial, his counsel did not complain of any difficulty in communicating with him, and no further claim was made of any mental incapacity on the part of the accused. Under these circumstances we hold that appellant was competent to stand trial and that the district court did not commit reversible error. We note in passing that evidence of serious untreated injuries to the head, in general should alert the district court to the probable need for an examination under §4244. Nevertheless, the district court must consider all pertinent evidence before it in exercising its discretion to determine whether to order an examination under §4244. The district court did that here and we find no abuse of discretion.

Both appellants claim that the government's use of a telescope and telephoto lens to enhance the surveillance team's view of appellants' activities carried out behind a large plate glass window of a lighted gas station located on a busy street at night violated their Fourth Amendment rights under United States v. Taborda, 635 F.2d 131 (2 Cir. 1980). We disagree. The government's observations, whether or not made with instruments made to enhance vision, were proper under the circumstances. Appellants took no precautions to manifest their expectation of privacy, nor could they have any reasonable expectation of privacy under the circumstances just mentioned.

Both appellants also object to certain remarks made in the government's summation at trial on the ground that the remarks would encourage jurors to draw adverse inferences from appellants' failure to testify. The prosecutor's statement does not appear to have been fair response to the comments of Bifield's attorney, but in any event it was improper insofar as it referred to the "defendants", thereby

including Bouton. Nevertheless, Judge Cabranes's forceful instructions cured any possibility of prejudice to Bifield and also to Bouton, given the evidence against her.

Finally, appellant Bifield claims that he has not given a reasonable opportunity to respond to the presentence report before sentencing. Since the Local Rules of the Connecticut District Court require presentence reports to be made available two days in advance of sentencing, and since it is known that the government was able to review the report in the day before sentencing, this claim is without merit. In any event, the district court made clear it was not relying on any material which Bifield wanted to challenge.

We have carefully considered all of appellants' claims of error and find them to be without merit. We order that the mandate issue forthwith.

WILLIAM H. TIMBERS/s/
UNITED STATES CIRCUIT JUDGE

JON O. NEWMAN/s/
UNITED STATES CIRCUIT JUDGE

ABRAHAM D. SOFAER
UNITED STATES DISTRICT JUDGE
Sitting by Designation.

APPENDIX B

United States District Court for
DISTRICT OF CONNECTICUT

United States of America vs.

DANIEL BIFIELD

CRIMINAL B-80-11

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date

NOVEMBER 20, 1980

X WITH COUNSEL James Diorio, Esq. and John Williams, Esq.

There being a verdict of X GUILTY, by the Jury on count #1.

Defendant has been convicted as charged of the offense(s) of violation of Appendix, Title 18, United States Code, Section 1202(a)(1) (Possession of firearm by convicted felon) as charged in count #1.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defend-

ant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extent the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends, that the defendant not serve term of imprisonment at the same institution as co-defendant.

Jose A. Cabranes/s/
11/20/80

No. 80-1842

In the Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL BIFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in not ordering a psychiatric examination to determine if petitioner was competent to stand trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

De Kaplany v. *Enomoto*, 540 F.2d 975, cert. denied, 429 U.S. 1075	9
Dusky v. *United States*, 362 U.S. 402	8
Meador v. *United States*, 332 F.2d 935	9
Moore v. *United States*, 464 F.2d 663	9
Rose v. *United States*, 513 F.2d 1251	9
United States v. *Clark*, 617 F.2d 180	9-10
United States v. *Cook*, 418 F.2d 321	9
United States v. *Ives*, 574 F.2d 1002	9
United States v. *Makris*, 483 F.2d 1082, cert. denied, 415 U.S. 914	10
United States v. *McEachern*, 465 F.2d 833	9
United States v. *Oliver*, 626 F.2d 254	9

Statutes:

18 U.S.C. app. 1202(a)(1)	2
18 U.S.C. 4244	6, 9

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1842

DANIEL BIFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unreported. The opinion of the district court is reported at 498 F. Supp. 497.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1981. The petition for a writ of certiorari was filed on April 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. app. 1202(a)(1). He was sentenced to a term of two years' imprisonment (Pet. App. 1b-2b). The court of appeals affirmed (Pet. App. 2a). Petitioner does not challenge the sufficiency of the evidence.

On the day the trial was scheduled to begin, petitioner personally addressed the court and said that he wished to discharge his attorney and hire another attorney (Tr. 2-3).[1] He said that he had been told by the attorney he intended to hire to ask for a continuance of "maybe a week" (Tr. 5) to arrange to hire the new attorney (Tr. 3, 4-5). He gave no other reason for seeking a continuance. At one point the court asked petitioner when he had concluded that he needed a new attorney, and petitioner replied (Tr. 3-4):

> Yesterday, when I sat down and met with a few people. Okay? We sat down and talked.
>
> Because everything went all right in the State Court, as far as I could see, you know. And I'm not an attorney. And, like, I've been confused, I have a lot of pressure in my brain, a lot of things in my brain, a lot of things have happened to me. So this is what I wanted you to hear.
>
> And I'd like to fire Mr. Diorio [petitioner's trial counsel]; I don't want him as an attorney. No disrespect to Mr. Diorio, or nothing like that. And I want to hire another attorney.

[1] "Tr." refers to the trial transcript.

The judge then asked the attorneys to approach the bench. Petitioner's counsel began by saying, "This is as much a surprise to me as it is to the Court, your Honor" (Tr. 7) and said that what petitioner told the court was "all I know about it" (Tr. 8). The government opposed the request for a continuance, pointing out that the trial had already been postponed several times, that petitioner had seen his attorney perform at a suppression hearing some time earlier, that petitioner gave no adequate reason for having just decided his attorney was inadequate, and that a continuance would significantly inconvenience government witnesses (Tr. 9-11). Petitioner's counsel then said (Tr. 14-15):

> I am prepared to go forward. The problem is with this unexpected turn, it puts [me in] a difficult situation * * *.
>
> * * * * *
>
> I feel like I have now somehow a credibility gap. I need the cooperation of my defendant. * * *
>
> * * * * *
>
> But it appears through talking to friends and people * * * he feels that his best interests would not be served by me. Knowing that he has that reservation makes it very difficult for me to adequately represent him with his cooperation.

The district judge, however, said that "[t]here's nothing to suggest that you're not going to have his cooperation. * * * [H]e may have expressed some reservations about your ability to be of assistance to him. But I don't think he indicated at any time that he was unwilling to cooperate with his counsel. Indeed, I believe he suggested he would be very cooperative" (Tr. 16). After petitioner's attorney again remarked: "I was prepared to try the case and I

wasn't asking to be withdrawn" (Tr. 18), the judge denied the motion for a continuance (Tr. 19), explicitly "recogniz[ing] the importance of having a defendant have counsel of his own choosing" (Tr. 20) but citing the many delays in the history of the case (Tr. 20, 23). Petitioner's counsel suggested that petitioner might wish to proceed without an attorney, but the court rejected this suggestion (Tr. 20-21). Petitioner's attorney then requested, and was granted, a five-minute recess in which to consult with petitioner and explain the judge's ruling (Tr. 20-21, 23).

After the recess, petitioner's attorney stated to the court that petitioner had been apprehended a few days earlier, apparently in connection with another offense, and had "receive[d] some injuries to himself, including blows to the head" (Tr. 25-27):

> It's my opinion, having known Mr. Bifield for a period of time, that he is somewhat less organized than usual, and your Honor can hear by his speech and his manner of conversation that his thoughts aren't flowing properly.
>
> Mr. Bifield tells me that he would like to try the case by himself, that he doesn't want to have me represent him, that he'd like to get other counsel, and he honestly in my opinion doesn't really seem to understand all about the case at the present time.
>
> I would respectfully suggest to the Court that it's not for any comfort to myself or any convenience to myself, that perhaps a 24-hour continuance to allow him to discuss it with other counsel and perhaps get some rest and some medical attention.
>
> * * * * *

> [I]n State Court last week * * * the Judge ordered from the bench that because of visible injuries he be given medical attention. He wasn't given that attention. He was seen by someone in a jail infirmary, was incarcerated for a couple of days, and presently is seeking medical attention, and probably some lack of confusion in his own life.

The judge replied that he was "surprised" that counsel had not raised any issue about petitioner's injuries or need for medical attention at the side bar conference (Tr. 27). The judge then explained to petitioner his decision to deny a continuance, specifically mentioning an earlier continuance and the inconvenience it caused to jurors (Tr. 28-30). Petitioner then said (Tr. 32-33):

> Well, I listened to you, what you said, that I had continuances and the State's four Jurors, or something, didn't show up. It's on both sides. Okay?
>
> I went through a lot of things. I was beat up by the same officers that were involved in this case. I was provoked. All right?
>
> I'm going through a lot of changes in my head. Okay? I got up, I get dizzy. This morning I had a hard time getting here. It's my fault, I've been sleeping, I've been resting three days. A Court or a Judge ordered me to go to get medical exam, and I was thrown in a room with two other inmates. I was just thrown on a metal bed. Okay? I was really hurting, and I was thrown in.
>
> I had to go through all this aggravation for three whole days. And finally, everybody said, "Oh, it don't look that bad," and I'm hurt. And boom, then I was released from jail. Oh, yeah.

Petitioner then repeated that he wanted a new attorney (Tr. 33-34), that he felt his attorney was not "adequately prepared," and that he was "getting railroaded" (Tr. 34). The case then proceeded to trial (Tr. 35).

On appeal, petitioner claimed that the judge erred in not ordering a psychiatric examination under 18 U.S.C. 4244. The court of appeals rejected petitioner's contention (Pet. App. 3a) and affirmed his conviction (*id.* at 2a). The court noted that petitioner "was responsive to the court and * * * understood the remarks made by his counsel," that he "engaged in no inappropriate behavior during trial," that his attorney did not report any difficulty in communicating with him, and that "no further claim was made of any mental incapacity" of petitioner (*id.* at 3a). The court cautioned that reports of serious untreated head injuries would ordinarily raise a question about the need for an examination, but it held that petitioner was competent to stand trial and that the district court had not abused its discretion in declining to order an examination (*ibid.*).

ARGUMENT

1. Petitioner's sole contention is that the district court erred in not ordering a psychiatric examination under 18 U.S.C. 4244. Petitioner acknowledges (Pet. 9) that Section 4244 was not explicitly invoked; neither petitioner nor his attorney filed the "motion for a judicial determination of [the] mental competency of the accused" required by Section 4244. Nevertheless, petitioner contends (Pet. 9) that the remarks he made to the district court "presented" "the issue of the [petitioner's] competence to stand trial" in a way that required the court to order a psychiatric examination.

This contention is without merit. Neither petitioner nor his attorney ever requested a psychiatric examination, and neither petitioner's own statements to the district court nor his attorney's statements drew petitioner's competence into question. In the colloquies that occurred before the recess, petitioner's attorney said that he was fully prepared to go to trial and was surprised by petitioner's request for a continuance. This affirmatively suggests that petitioner's attorney had no reason to believe that petitioner was unfit to stand trial. Both petitioner and his attorney viewed petitioner's decision to change attorneys as the product of calculation and discussion with others—not as a manifestation of severe irrationality or a psychological difficulty. Petitioner's attorney was concerned that petitioner might be uncooperative not because of any mental problem but because petitioner wanted a different attorney. Indeed, petitioner's counsel even suggested that petitioner might wish to represent himself; at that time, had petitioner's attorney been concerned that petitioner was not competent, he would surely have expressed doubts about petitioner's ability to represent himself.

The petition quotes (Pet. 5), wholly out of context, petitioner's comments about " 'pressure in my brain, a lot of things in my brain[.]' " Even the immediate context of this remark makes it clear that petitioner was attempting to explain his failure to seek another attorney sooner by saying that the rush of events had confused him and that he had not adequately reflected on them. The larger context of the colloquies that occurred before the recess—colloquies that focused exclusively on petitioner's requests for a continuance and new counsel—leaves no doubt that petitioner was not referring to a psychiatric problem.

After the recess, petitioner and his attorney did refer to petitioner's condition. But they said only that petitioner had injuries and needed rest and medical attention. Petitioner's counsel said that a continuance of 24 hours would be adequate; petitioner himself appeared to believe that rudimentary medical care would suffice. Neither referred in any way to mental or psychological problems. Neither suggested that petitioner needed a psychiatric examination; neither used the term "competence." Although petitioner's counsel said that petitioner was not as lucid as he ordinarily would be and did not fully understand the case, the remedy petitioner's counsel proposed—a brief rest and care for the injuries—makes it clear that counsel thought these difficulties were only a very temporary consequence of petitioner's physical injuries. In any event, counsel's other remarks, particularly before the recess, are wholly inconsistent with any suggestion that counsel was questioning petitioner's competence to stand trial. Petitioner's references to dizziness and "a lot of changes in my head" were part of a list of misfortunes petitioner compiled in attempting to persuade the judge to grant a continuance. Petitioner, too, apparently thought they were the temporary result of his injuries. And in any event, occasional dizziness and "changes in my head" do not constitute incompetence to stand trial.

In sum, nothing said by either petitioner or his trial counsel raised a significant question about petitioner's "ability to consult with his lawyer with a reasonable degree of rational understanding" or his "rational as well as factual understanding of the proceedings against him" (*Dusky* v. *United States*, 362 U.S. 402, 402 (1960)). Nothing they said can be construed as a request for a psychiatric examina-

tion. In these circumstances, the district judge had no obligation to order such an examination under 18 U.S.C. 4244. See, *e.g.*, *United States* v. *Oliver*, 626 F.2d 254, 258 (2d Cir. 1980); *Rose* v. *United States*, 513 F.2d 1251, 1255 (8th Cir. 1975); *United States* v. *McEachern*, 465 F.2d 833, 837-839 (5th Cir. 1972).

2. According to petitioner (Pet. 8-9), the Ninth Circuit takes the position that a district judge must grant a defendant's first motion for a psychiatric examination under 18 U.S.C. 4244. See *United States* v. *Ives*, 574 F.2d 1002, 1005 & n.3 (9th Cir. 1978); *Meador* v. *United States*, 332 F.2d 935, 937-938 (9th Cir. 1964). But petitioner did not request such an examination; even in the Ninth Circuit, no examination would have been required because the issue of competency was not "properly raised" (*United States* v. *Cook*, 418 F.2d 321, 324 (9th Cir. 1969)). Moreover, in the Ninth Circuit, a district judge apparently need not order an examination *sua sponte* under 18 U.S.C. 4244 unless there is " 'substantial evidence' " of incompetence—" 'evidence * * * rais[ing] a reasonable doubt about the defendant's competency to stand trial.' " See *United States* v. *Clark*, 617 F.2d 180, 185 (9th Cir. 1980), quoting *De Kaplany* v. *Enomoto*, 540 F.2d 975, 980-981 (9th Cir. 1976) (en banc), cert. denied, 429 U.S. 1075 (1977), quoting *Moore* v. *United States*, 464 F.2d 663, 666 (9th Cir. 1972). Thus petitioner would not have been entitled to a psychiatric examination in the Ninth Circuit, and the conflict between circuits alleged by petitioner is not presented by this case.[2]

[2] In any event, in the Ninth Circuit a failure to hold a hearing under Section 4244 would be harmless error unless the defendant was in fact incompetent. See *United States* v.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Clark, supra, 617 F.2d at 185 n.8; *United States* v. *Makris*, 483 F.2d 1082, 1091 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974). Petitioner does not claim that he was incompetent at trial and advances no evidence of incompetence; the court of appeals specifically held that petitioner was competent and supported its conclusion with evidence. See page 6, *supra*; Pet. App. 3a.

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